No. 14789

United States
COURT OF APPEALS
for the Ninth Circuit

MICHAEL R. PLASTINO and RUTH C. PLASTINO, husband and wife,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, husband and wife; RAY DOUGLAS and PAULINE DOUGLAS, husband and wife; SIGMUND WENDLING and DOROTHY WENDLING, husband and wife; LORAN D. HARVESTON; LYLE SIMMONS; GEORGE HODGDON; C. K. WARREN; and OSCAR TITTLE,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court for the District of Oregon.

GEORGE P. WINSLOW,
WM. C. RALSTON,
IRVING RAND,
Attorneys for Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-56

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Appeal from the United States District Court for the District of Oregon.

JURISDICTION

We do not believe that the jurisdictional requirement of $3000.00 in controversy has been met. This point was raised by the defendants in the trial court by:

1. Denying the allegation in the complaint claiming jurisdiction; and,

2. Motion to Dismiss for lack of jurisdiction (Second Defense); and,
3. It was also specified as a defendants' contention (Tr. 34).

The complaint generally contains two causes of action; one a suit for specific performance of the contract of November 7, 1945 against the defendants Estber Mills and his wife, and two, a claim for damages against the remaining defendants (except Oscar Tittle) claimed to have been incurred in the removal of timber on the premises sold under the contract of November 7, 1945.

At the time the action was instituted the said premises (Lot 8) were worth $1200.00 according to the plaintiffs' evidence. The witness Richard D. Kerr so testified (Tr. 117). Another witness for the plaintiff, E. W. Ford, testified the premises were worth $1000.00 (Tr. 73).

It is the value of the property at the commencement of the action (not the contract price) which establishes the amount in controversy. *Ebensberger v. Sinclair Refining Co.,* 165 Fed. 2d 803; *Johnson v. Trippe,* 33 Fed. 530; *Sinclair Refining Co. v. Miller,* 106 Fed. Sup. 881.

As to the trespass phase of the case, the complaint charged the defendants, Sigmund Wendling, C. K. Warren, Loran D. Harveston and George Hodgdon, with wilfully, without the plaintiffs' consent, cutting and carrying off timber from the plaintiffs' land thereby damaging them in the sum of $3051.10. The charge in the complaint that said defendants so conspired with the defendant Estber Mills was not supported by evi-

dence. On the question of the amount of damages, the plaintiffs submitted evidence that the value of the timber removed from Lot 8 was $2437.00. The witness W. Henry Thomas so testified (Tr. 70).

It is hardly necessary to point out to Your Honors that the jurisdiction of the District Court is not conferred by a pyramiding of damage claims. Assuming, but not admitting, that the plaintiffs were entitled to sue for specific performance, the only defendants in such a suit were Mr. Mills and his wife. On the other hand, in suing for damage for trespass and conversion the only proper defendants, of course, would be persons who actually trespassed and converted timber. It is an impossibility to put either Estber Mills or his wife in this category for the simple reason that they at all times held title in fee simple to Lot 8. We know of no legal leger de main by which a man may trespass on his own property.

Accordingly, since neither the suit for specific performance nor the claim for damages for trespass involved $3000.00, the District Court did not have jurisdiction. *Sloane v. Kramer Bros. & Co.,* 230 Fed. 727. In this case, which was a suit to remove a cloud from title, it was held that the amount in controversy was the value of the land, title to which was directly attacked, and that damages also prayed for value of timber cut from the land should be considered incidental, and not calculable in fixing the jurisdictional amount.

Jurisdiction of the District Court was put in issue as before stated. It was therefore the duty and burden

of the plaintiffs to establish that the jurisdictional requirements had been met. This they failed to do, and are not properly in court. *KVOS v. Associated Press,* 299 U.S. 269, 81 L. Ed. 183. *McNutt v. GMAC,* 298 U.S. 190, 56 S. Ct. 780, 80 L. Ed. 1135. *Electro Therapy Products Corp. v. Strong* (CCA 9), 84 Fed. 2d 766.

In *KVOS v. Associated Press,* supra, the court said:

> "Since the allegation as to amount in controversy was challenged in appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed. McNutt v. General Motor Accpetance Corp., supra, p. 190. The Circuit Court of Appeals had jurisdiction of the appeal and as the District Court lacked jurisdiction its decree dismissing the bill should have been affirmed on that ground."

In *Electro Therapy Products Corp. v. Strong,* supra, the Ninth Circuit Court of Appeals held that it should determine whether the District Court had jurisdiction of the suit notwithstanding that question was not raised by the parties, saying:

> "The District Court's jurisdiction is to be tested by the value of that right. McNutt v. General Motors Acceptance Corp., 298 U.S. , 56 S. Ct. 780, 80 L. Ed. , decided May 18, 1936. That value depends, of course, on the value of the inventions. The precise nature of the inventions cannot be ascertained from the record. The evidence shows that they have not been patented. There is no proof that they are patentable, or that their value, if any, exceeds $3,000."

In suggesting that the District Court did not have jurisdiction we are not overlooking the extravagant claim of the plaintiff for treble damages "by authority of

statute in such case made and provided". No such statute was plead. ORS 105.810, upon which the plaintiffs apparently rely, permits treble damages for trespass to timber if "without lawful authority". The law presupposes that the plaintiff in such a case owns the premises trespassed upon. It would be a legal impossibility for the plaintiffs to recover treble damages against anyone in this case.

We conclude, therefore, by suggesting that the District Court did not have jurisdiction of the case because $3,000.00 could not be claimed against any individual defendant.

STATEMENT OF THE CASE

The appellants' statement of the case is rather argumentative. For the convenience of Your Honors we submit the following:

This case involves the rights and obligations of various parties growing out of the contract of November 7, 1945 (Ex. 1), for the sale of 43 acres of land in Tillamook County, Oregon, by the owners, Estber Mills and Edna Mills. The purchasers were R. F. Hogan and Sally Hogan. The purchase price was $1575.00.

The Hogans assigned their interest in the contract on January 25, 1947 to the Plastinos (parents of Mrs. Hogan). The Plastinos never assumed the contract, nor agreed to be bound by its terms in any respect. It would have been a legal impossibility for Mills to require any compliance with the contract whatsoever. Actually the

only control Mills had, so far as the Plastinos were concerned, was to cancel or terminate the contract.

Payments were thereafter made by the Plastinos, though not always on time. On one occasion the Plastinos requested (Letter of August 5, 1948, Exhibit 5), and received permission (Letter August 16, 1948) to skip a payment. Three payments were missed in 1946; three missed in 1948; two in 1949 and none in the last six months of 1950. In June, 1950 there was a balance of $775.27 owing on the contract (Exhibit 25). (The contract of November 7, 1945 should have been paid out in five years—or November 7, 1950).

On January 30, 1950 default for non-payment was declared by Mills in a letter to the Plastinos. It was received February 3, 1950 (Exhibit 18).

On February 4, 1951, the Plastinos tendered a check for $25.00 (Exhibit 19) to Mills which he refused.

The Plastinos did not communicate with Mills thereafter for more than two years. On August 26, 1953 their attorney tendered the Mills a check for $675.00 (and a deed for execution) (Exhibit 21), which tender was refused.

The trial court found there had been an abandonment by the Plastinos and denied specific performance.

As to the trespass phase of the case, the following occurred:

On December 7, 1951, Mills sold the timber on Lot 8 to Ray Douglas for $1500.00 (Exhibit 26).

On December 8, 1951, Douglas sold the timber to Sigmund Wendling for $1500.00 (Exhibit 26).

In June, 1952, Wendling entered into a written agreement to sell timber from Lot 8, up to $1500.00 to C. K. Warren (Exhibit 31).

In July, 1952, Warren and George Hodgdon entered into logging partnership (Exhibit 33).

On December 12, 1952, Warren assigned his interest in the contract to Loran D. Harveston for $225.00 (Exhibit 35).

These above mentioned defendants were charged by the plaintiffs with conspiring to and unlawfully cutting and remvoing timber from Lot 8 without plaintiff's consent.

The trial court found no evidence of any conspiracy on the part of these defendants.

The trial court held that under the contract of November 7, 1945, Mills had the right to declare a forfeiture—and that this right had not been waived by him.

The trial court further held that the Plastinos abandoned any right they may have had by failing to communicate with Mills for over two years after the declaration of forfeiture.

ARGUMENT

Appellants have specified (Ap. Br. 10) ten alleged errors concerning findings of fact entered by the trial court, and eight alleged errors with respect to the con-

clusions (Ap. Br. 12, 13). Unfortunately counsel for appellants has apparently misread or misconstrued several of the findings. For example it is charged (Spec. 4, Ap. Br. 10) that the trial court stated "The contract had been cancelled on January 1, 1951 for failure to make necessary installment payments or pay the taxes." The record shows that the above quoted language was preceeded by the language "defendants Mills notified plaintiffs that, etc." (Tr. 55). Accordingly, this specification (No. 4) can be entirely disregarded, and we do.

Appellants' specification 3 (Ap. Br. 10) seems likewise not to merit consideration. We do not understand counsel's criticism that the finding *implied* that the contract was breached. As stated the finding is 100% correct. Any implications are solely in the mind of the reader. We disregard this specification.

Again the specification (No. 4, Ap. Br. 12) that the trial court concluded 'there were no tenders" is baseless. Counsel for appellants has apparently misread Conclusion II. See Tr. 59. We disregard this specification.

As to the remaining specifications since counsel for appellants has not indicated them by number, or otherwise, in the Argument, we feel justified in grouping them and discussing them collectively as falling into the following categories:

A. Terms and form of the *contract*.

B. Was there a *forfeiture?*

C. Was there abandonment?

D. Conspiracy.

E. Trespass.

A. There was only one contract.

In the trial court counsel for the appellant tried to establish that the contract of November 7, 1945 was modified. It should be kept in mind that the original contract (November 7, 1945, Exhibit 1) was between Mr. and Mrs. Mills as vendors and Mr. and Mrs. Hogan as purchasers. The contract specified a purchase price of $1575.00, payable $100.00 down, and the balance at $25.00 per month plus interest. This would make approximately a five year contract; to be exact 59 months. It was a printed form contract and contained the provision:

> "The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

About a year after the contract was executed Mr. Mills wrote the Hogans that instead of applying the full $25.00 payments to principal, as provided in the contract, he had credited the payment first to accrued interest and the balance to principal. This letter was dated November 29, 1946 (Exhibit 2), and is set out at page 4 of appellants' brief.

On January 31, 1947 the Hogans wrote the Mills as follows:

> "I am sorry to say, that due to our financial position, we have had to turn the property over to

my parents, Mr. & Mrs. M. R. Plastino, 1423 Madrona Drive, Seattle. They will, I am sure, be able to make the payments on time.

My husband and I wish to thank you for your help and patience during the past year. Believe me, we do appreciate it." (Exhibit 104B)

It will be observed (on the reverse side of the contract of November 7, 1945, Exhibit 1) that the assignment by the Hogans to the Plastinos, parents of Mrs. Hogan, is dated January 25, 1945, but this is believed to be a mistake, and should read January 25, *1946*.

In the trial court, and on this appeal, counsel for appellants insists that "said contract" now means the contract of November 7, 1945 (Exhibit 1) plus the letter Mills to Hogans, November 29, 1946 (Exhibit 2) plus the letter Mills to Plastinos, August 6, 1948 (Exhibit 6).

We are quite familiar with the rule that a contract may be established by correspondence between two parties. We agree that it is further possible to modify the term of a previous written contract by a subsequent writing. However, for such a writing to constitute a true modification it must be based upon a valuable consideration and understood by the parties to constitute a modification. Otherwise, such writing would lack mutuality and would be of no effect.

We should point out that it is entirely illogical, in any event, to take two isolated letters, forming a part of the correspondence between the parties over a period of several years, and insist that two such letters, only, became a part of the original contract. Why not include *all* of the correspondence or, in any event, such letters

as one from the Plastinos to Mills, September 13, 1950 (Exhibit 16) which was stated:

> "I should have written to you sooner but I have delayed because I expected to get back to work any day. I have not worked since April 15th this year and I do expect to be back on the job in the very near future at which time I will begin payments again."

Or why not include the letter of Mills to Plastinos dated March 7, 1950 (Exhibit 13) in which was stated:

> "I started to check your book work and on your third payment there was a one cent mistake. So I checked your balance with ours which does not jibe. I also find you have 44 payments, but I have 45, so you missed one some place. Also you have this years taxes $59.39. This is the tax on the house here in town. Your taxes were $124.77 which receipt I sent you. The way I have things now you owe $874.07 with this last payment. I hope this will start you out again."

To include any (or all) of the parties' correspondence would, of course, be an absurdity, in the present case. The contract of November 7, 1945 was *not* modified in any legal sense. Its interpretation by the parties (and Plastinos were not even a party to it) does not constitute modification.

In *Carnahan Mfg. Co. v. Beebe-Bowles Co.,* 80 Ore. 124, 156 Pac. 584, it was held that while it is competent for parties to modify an original contract so as to accomplish substantially a new agreement, the latter stipulation must be one wherein the minds of the parties meet on identically the same proposition. The Supreme Court of Oregon said:

"It was competent for the parties to modify their original contract which would amount to making a new agreement; but this later stipulation, like all others, must be one in which the minds of the parties meet on identically the same proposition. The record shows that the plaintiff proposed certain changes in the contract, but it does not show that the defendant accepted the offer. It was therefore error for the court to say to the jury:

> 'That a modification of a contract submitted and taken under consideration must be answered. If it is not answered, it is agreed to.'

"No one receiving an overture to change an agreement to which he is a party is obligated to answer the same. His silence cannot be construed as an acceptance if nothing else is shown. The doctrine of contract by offer and acceptance is stated in Henry v. Harker, 61 Or. 276, 118 Pac. 205, 122 Pac. 298; and Lueddemann v. Rudolf, 154 Pac. 116, 155 Pac. 172."

With reference to what conduct constitutes a modification the following language from *Marnon v. Vaughan Motor Co.*, 184 Or. 103, 194 P. 2d 992 is pertinent:

"With reference to the question of what conduct will constitute modification of a contract it is said in 4 Page on the Law of Contracts 4357, § 2458:

> 'While the parties to a contract may modify it by a subsequent contract which is shown by their acts, the acts which are relied upon to modify a prior contract must be unequivocal in their character. Acts which are ambiguous in their character, and which are consistent either with the continued existence of the original contract, or with a modification thereof, are not sufficient to establish a modification.
>
> 'Conduct which is not necessarily inconsistent with the continuation of a contract, will not be

> regarded as showing an implied agreement to discharge it, although such conduct might have been consistent with an agreement to discharge such prior contract.'
>
> "(13) And it is, of course, well established that the minds of the parties must have met upon the asserted modification. 17 C.J.S., Contracts, 1229, § 588; 13 C.J., Contracts, 762, § 950; Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 N.W. 825; Molostowsky v. Grauer, Sup Ch., 113 N.Y.S. 679."

It has been held that granting an extension of time in which to complete a contract does not constitute a new contract. *Johnson v. Myers,* 91 Ore. 179, 177 Pac. 631. In this case the Supreme Court of Oregon said:

> "Under the contract all of that wood was to be hauled by September 1, 1916. On August 12th the plaintiff wrote to the defendants, asking for an extension of 30 days in which to complete the contract; in response the defendants advised him that they 'would grant him an extension of thirty days'. This did not amount to a new contract; it was merely an extension of time in which to perform the original agreement."

Counsel for appellant observes (p. 4, Ap. Br.) that Mills never advised the Hogans nor Plastinos of any change in the manner of applying interest as indicated in his letter of November 7, 1946 (Exhibit 2). It was probably impossible to so notify the Hogans as they assigned their rights to the Plastinos shortly thereafter. Nor was it incumbent upon Mills to further advise the Plastinos. If they didn't like the arrangement they could have said so. Mills was under no obligation to the Plastinos, in any event.

B. Forfeiture.

Any discussion of forfeiture by the Plastinos involves a consideration of what constituted the contract as well as whether there was a waiver by Mills of any of its terms. Counsel for appellants apparently contends that there could be no forfeiture because Mills by the letter of August 6, 1948 (Exhibit 6), had waived any right to claim a forfeiture. The provision in re forfeiture is as follows:

> "But in case the second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms, and at the times above specified, or fail to keep any of the other terms or conditions of this agreement, time of payment and strict performance being declared to be of the essence of this agreement, then the first party shall have the right to declare this agreement null and void and foreclose by strict foreclosure in equity, and in either of such cases, all the right and interest hereby created or then existing in favor of the second party derived under this agreement shall utterly cease and determine, and the premises aforesaid shall revert and revest in the first party without any declaration of forfeiture or act of re-entry, or without any other act by first party to be performed and without any right of the second party of reclamation of compensation for money paid or for improvements made as absolutely, fully and perfectly as if this agreement had never been made."

It is further counsel's contention that Mills not only waived this provision regarding forfeiture by writing the letter of August 6, 1948 (Exhibit 6), but it was Mills' *duty to advise Plastinos* if he wasn't going to rely on it in the future. This was never the intent of the parties involved. The language of the letter itself disputes any

such construction. First of all the letter was in answer to the letter the Plastinos wrote on August 5, 1948 (Exhibit 5), in which was said:

> "I am short to the extent that I have to ask if you will hold off my August 1st payment till I get caught up which I hope will be very soon."

Mills wrote back:

> "I am very sorry to hear of your daughter's sickness and hope for the best for her recovery. It is quite all right to *skip your payment for August* and any other time when you are short." (Exhibt 6, emphasis added).

By this letter Mills excused non-payment of one month only—namely, August. He did offer to let Plastinos skip payments in the future *when they were short,* but certainly they had the duty to inform Mills of such a situation and request permission to skip payment. Mills had no duty to write and ask them each month if they were "short". Any such contention is an absurdity and would render the contract of November 7, 1945 a nudum pactum.

On January 30, 1951, Mills wrote the Plastinos as follows:

> "Your contract was cancelled, January 1, 1951, for failing to keep up your payments and taxes." (Exhibit 18).

Now whether this was sufficient as a notice of forfeiture is entirely unimportant. It *was so regarded* by the Plastinos. If they did not agree with the proceedure it was their duty to advise Mills. At the time of the cancellation they were behind over seven months in their payments (unexcused). The forfeiture provision in the

contract was still in effect. Neither Exhibit 2, Exhibit 6 or any other writing between the parties varied or nullified the effect of the final paragraph of the original contract (Exhibit 1) namely:

> "The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

None of the parties involved ever contended that this final paragraph was not operative. Mills relied on it for over two years. After Plastinos consulted with attorneys, the letter, tendering a check for $675.00, was sent on August 26, 1953 to Mills, who refused it (Exhibit 105A). In its opinion, the trial court stated (Tr. 52):

> "A vendor who has not received a payment for almost seven months has the privilege of declaring the contract null and void in accordance with other provisions of the contract even though he has on prior occasions waived strict performance of the requirement to make the monthly installments.
>
> "I am even more convinced that the failure of the plaintiffs to communicate with the defendant Estber Mills or to tender the amount due for a period of more than two years after their $25.00 check was returned to them constitutes an abandonment of any title which they might have held at that time."

This brings us to a discussion of the most important feature of this case, namely, abandonment of the contract by the Plastinos.

C. Abandonment.

The trial court was impressed by the fact that after receiving Mills' letter stating the contract had been cancelled the Plastinos never contacted him, remonstrated, nor did anything in connection with the contract until August 26, 1953, when they tendered $675.00 through their attorney.

A discussion of *Collins v. Keller,* 62 Ore. 169, 124 Pac. 681 seems particularly appropriate at this point. In that case involving the purchase of a piece of real property in Multnomah County, the evidence showed that two years elapsed before the purchaser offered to make the payment required, and meanwhile the property had doubled in value. It was held the delay amounted to an abandonment by the purchaser. The Supreme Court of Oregon observed:

> "The testimony shows beyond dispute that more than two years elapsed before the plaintiff offered to pay, although the defendant had sought to either close the transaction or return the deposit and rescind the bargain. Meanwhile the property had doubled in value. In the light of these facts, we hold that plaintiff's long delay amounts to an abandonment of the contract on his part and renders it inequitable within the discretion of a court of equity to specifically enforce an agreement otherwise in good form. Chabot v. Winter Park Co., 34 Fla. 258, 15 South. 756, 43 Am. St. Rep. 192."

Some criticism has been made by counsel for appellants of the finding of the trial court by suggesting that there was no finding of the facts upon which a conclusion of abandonment was based. But counsel overlooks the fact that the word "abandonment" itself includes

not only physical acts of a party, but also his intent in respect thereto. *Sharkey v. Candiani,* 48 Ore. 112, 85 Pac 219. This is also established by *Hull v. Clemens,* 200 Ore. 533, 267 P. 2d 225, wherein it was held that abandonment of an equitable title in realty is entirely unilateral, in that it requires action by only the possessor of such title. Here the Supreme Court of Oregon said:

> "However, it is well established that an unperfected equitable title may be lost by abandonment. Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 195 N.W. 966, L.R.A. 1917D, 905. This court recently held in Powers v. Coos Bay Lumber Co., Or., 263 P. 2d 913, that the rights conferred by an easement may be extinguished by abandonment. That decision also held that in abandonment time is an immaterial element. It pointed out that the moment intention to abandon unites with acts of relinquishment, the abandonment is complete.
>
> ". . . His actions about the time when the 1942 payment fell due are strongly indicative of abandonment. It will be recalled that the Hulls were then selling their cattle and that they had met with financial misfortunes.
>
> ". . . Very likely Hull's plight, when the day came to make the 1942 payment was an unfortunate one. He had suffered severe financial reverses and had resorted to the sale of his cattle. Seemingly, when the time came to make the 1942 payment, he was avoiding Clemens. His own testimony indicates that about that time he was trying to avoid the service of process upon him in a case which a man by the name of Jordan had filed. It is not unusual in situations of that kind for the victim of misfortune to pull up his stakes and move on to another place which offers greater hope."

If appellant acquiesced in the notice of cancellation received by Mills then they abandoned any rights they had under the contract, and have no cause of suit. At the expense of repetition we summarize the facts:

1. Up to the latter part of the year 1949 the appellants had skipped several payments without objection from Mr. Mills, the vendor. In fact Mr. Mills, prior to that time, had written letters giving his express consent for them to skip some payments. Commencing in the latter part of the year 1949, appellants' payments were prompt and regular until June, 1950.

2. In June, 1950, appellants, without notice of any kind to Mills and without any further letter from Mills, abruptly quit making payments on the contract and never made any payments thereafter.

3. On January 30, 1951, the vendor Mills, by letter, cancelled the contract by reason of the non-payment of purchase price and taxes. This notice of cancellation was sent to appellants by registered mail and was received by them, according to the register return slip, February 3, 1951 (Exhibit 18).

4. On February 4, 1951, one day after appellants received letter of cancellation, they mailed to Mills another check for $25.00. Mills immediately returned the check with a statement that the contract had been cancelled, and this letter and check which Mills returned were received by appellants on February 7, 1951 (Exhibit 20).

5. After the receipt by appellants of the letter of cancellation, they never in any manner objected or

remonstrated against the cancellation and did not in any manner write, telephone or contact Mr. Mills in reference to said contract, or otherwise, until approximately August, 1953 (Tr. 94).

6. Mills sold the timber, and logging operation to remove the timber were carried on by some of the defendants in this cause.

7. Late in August, 1953, appellants contacted Mr. Mills and then had John Hathaway, an attorney of Tillamook, Oregon, write Mr. Mills a letter on August 26, 1953. By this letter a deed was requested and a check, which appellants had secured and held for more than one year, for $675.00 was tendered to Mills. It is admitted that this check was for an insufficient amount. It has been stipulated that there was $775.00 due on contract on July 1, 1950 (Exhibit 25).

8. Appellants made no payments on the property since June, 1950, and Mills continued to pay the taxes.

9. Appellants by their two assignments from R. F. and Sally Hogan never assumed the obligations of the purchasers. Appellants were not obligated to Mills and Mills could not have forced them to pay for the property. It is most important to keep in mind that appellants had not obligated themselves to Mills or assumed any obligations of the purchase contract when determining the effect of their conduct. *Boston Store v. Newbury,* D. C. Ill. 1949, 83 F. Supp. 442.

It is these facts that form the basis for the contention that appellant, long prior to the bringing of this suit,

by their conduct, acquiesced in cancellation of contract and abandoned the same.

The authorities definitely hold that a vendee may abandon a contract, by conduct, and no notice to the vendee is required when the contract has been so abandoned. *Anderson v. Hurlbert,* 109 Ore. 284, 219 Pac. 1092. *Geroy v. Upper,* 182 Ore. 535, 187 P. 2d 662.

So here the appellants knew that the contract provided that any waiver by Mills of any provision of the contract would not "be held to be a waiver of any succeeding breach of any such provision."

With this knowledge appellants quit making payments in June, 1950. After waiting seven months without receiving any payments, Mills on January 30, 1951, by letter, cancelled the contract on account of failure to make payments. Appellants for two and one-half years remained silent after receiving the letter from Mills cancelling the contract.

Appellants well knew that Mills could not force them to pay the balance owing on the contract. They had assumed nothing under their assignments.

Under such circumstances the conduct of appellants was such as to indicate an intention to abandon the contract. Their silence and their failure to contact Mills in any way after receiving letter of cancellation was a clear acquiescence in the attempted cancellation of contract by Mills, even though it be admitted that Mills had no right to do so at the time the letter was written.

The appellants abruptly quit making all payments for seven months prior to the attempted cancellation and they remained absolutely silent without objection or remonstrating in any way for more than two years after receiving letter of cancellation.

In the case of *Newell v. Stone Co.,* Calif., 184 Pac. 659, 9 A.L.R. 993, the court considered a similar situation and said:

> "The plaintiff could not take advantage of his own fault. (Citing authorities) Plaintiff was in default when the notice was received by him. True, his prior default had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract; but he could not, by merely saying nothing, gain the right to demand repayment of the installments of the purchase price previously made."

The only excuse offered by appellants was the uncorroborated and unsupported testimony of Mrs. Plastino that some lawyer in Seattle advised appellants to get a bank check for the amount owing and hold the check until a foreclosure suit was commenced (Tr. 94).

Such testimony was clearly immaterial and irrelevant, inconsistent and hearsay. No qualified attorney would give such advice. Appellants did not attempt to produce any supporting testimony from such attorney. Mr. Plastino was present at the trial and did not corroborate his co-plaintiff.

The language in *Percy v. Miller,* 197 Ore. 230, 251 P. 2d 463, is quite perinent:

> "It is a general rule of equitable jurisprudence that a palintiff coming into equity for specific per-

formance must show not only that he has a valid, legally enforceable contract, but also that he had complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract, in their entirety, and to do whatever has been made a condition precedent on his part. 49 Am. Jur., Specific Performance, 53, § 40; 5 Pomeroy, Equity Jurisprudence, 2d Ed. 4972, § 2227."

In *DeWaal v. Califf,* 182 Ore. 93, 185 P. 2d 577, it was held that a contractor was not entitled to specific performance of a building contract providing that if he failed to complete the work by February 22 the owners might terminate his right to proceed, and the owners did so on May 4th. The Supreme Court of Oregon said:

"Plaintiff's own evidence is to the effect that he had refused to do any more work on the house until additional payments had been made to him by defendants and that without such additional payments he was financially unable to purchase the necessary materials for its completion. Under the terms of the contract the house was to be completed by February 22, 1945. It was not until May 4th of that year, and after the plaintiff had ceased to work on the building, that the defendants notified him that they were "taking over the work and will complete the same according to the contract."

D. Conspiracy.

In order to recover damages for the removal of the timber from Lot 8 it was necessary for the appellant to allege *and prove* a conspiracy on the part of the various defendants to cut and remove timber from the premises

of the appellants. Since, as before pointed out, the appellants did not own Lot 8, which at all times has been owned in fee by the Mills, it would seem that the charge of trespass was doomed to dismissal at the proper time.

Appellants specify as an error of the trial court its failure to conclude there was a conspiracy (Ap. Br., p. 13). This is rather surprising, in view of the fact that counsel for appellants is himself unable to point out what the conspiracy consists of (Ap. Br., p. 25). An attempt is made to denominate the acts of the defendants as either a conspiracy or confederation—while it is admitted that nomenclature is not an issue—the inability to typify is significant. In any event there was a total and embarrassing failure on the part of the appellants to establish either conspiracy, confederation or even *association* on the part of the defendants to effect an unlawful purpose. This is further demonstrated by the invectives hurled by counsel for appellants in the direction of Mr. Mills, claiming he was in court with unclean hands. This is the most surprising aspect of this bizarre proceedings. First, it is the first instance coming to the writer's attention where a defendant has been hailed into court on a charge of having unclean hands. The charge is in the nature of an equitable estoppel, and should not be the basis of an original action. But irrespective of that feature we fail to understand how Mills' alleged unclean hands could soil the other defendants. It certainly doesn't establish a conspiracy, confederation or association. (May we parenthetically point out that it was *impossible* to establish a conspiracy of the defendants because none in fact existed.)

Addressing, for the moment, our remarks to the charges against Mills (commencing page 30 Aps. Brief).

1. Although he had a recorded contract of sale *he told no one of it*. The fact of recording told the public.

2. Misrepresentation of tax liability. No such misrepresentation was proven.

3. The trial court did not admire him for the manner of cancelling the contract. Mills himself is not on trial—his personality is of no concern to court or counsel.

4. He executed a "receipt". This is counsel's language. The instrument itself speaks for itself. It reads:

> "We hereby sell to Ray Douglas all timber on Lot 8 in Section 22 Township 1 North of Range 10 West of Willamette Meridian for $1500.00.
> Paid in full."

Such a writing was held to be a conveyance in *Frederick v. Fox* (Cal. 1949), 204 P. 2d 126.

5. Sold 43.46 acres without knowing the amount was there. There still is no competent evidence that there wasn't.

6. Testified he did not change the terms of the contract. He didn't.

7. Initiated the chain of causation and assisted in its final unlawful stages. This is nothing but a jumble of words and is a charge of nothing.

A similar tirade is directed against Wendling (Aps. Br., p. 32) which we find it unnecessary to answer.

We conclude by saying there is a complete lack of evidence of conspiracy or confederacy (nomenclature is not an issue).

E. Trespass.

The appellants have specified as error the supposed failure of the trial court to find on trespass and destruction of appellants' property. The trial court found and commented on the various activities or connection of the defendants with the removal of the timber. The trial court found generally that the defendants were entitled to a judgment in their favor. There was no error on the part of the trial court. The argument of counsel for appellants to the contrary is without merit. The suggestion (Aps. Br., p. 25) that the court had obtained information concerning the facts of the conspiracy to trespass from a *trial brief* submitted to it is rather surprising. We were not aware that a brief of counsel becomes evidence.

CONCLUSION

The opinion of the trial court appears in its entirety in the Transcript, commencing at page 46. It is an excellent summation of the case. We commend it to Your Honor's attention.

We conclude in asking that the decree of the trial court be sustained in all particulars.

Respectfully submitted,

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December 1, 1955.